No. 83-1184

In the Supreme Court of the United States

OCTOBER TERM, 1983

TENNESSEE WATER QUALITY CONTROL BOARD, ET AL.,
PETITIONERS
v.
TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the waiver of sovereign immunity contained in Section 313 of the Clean Water Act, 33 U.S.C. (Supp. V) 1323, for state pollution regulation of federal facilities authorizes the State of Tennessee to require the Tennessee Valley Authority to obtain a permit in order to continue to operate its Ocoee No. 2 dam.

2. Whether Section 313 of the Clean Water Act permits TVA to remove to federal court a state administrative proceeding concerning the State's effort to regulate TVA's operation of one of its dams.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 717 F.2d 992. The opinion of the district court (Pet. App. A17-A24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1983. A petition for rehearing was denied on October 20, 1983 (Pet. App. A16). The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Tennessee Valley Authority Act (TVA Act), Congress provided generally that there should be a "unified development and regulation of the Tennessee River system," and stated that the basic statutory objective is the achievement of "(1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; [and] (3) the maximum generation of electric power consistent with flood control and navigation." Sections 23 and 26a of the TVA Act, 16 U.S.C. 831v and 831y-1; see also 16 U.S.C. 831h-1.[1] The Tennessee Valley Authority's (TVA) Ocoee No. 2 hydroelectric project, which was originally built by a private power company in 1913, was purchased by TVA in 1939 to serve as part of the unified river control system on the Tennessee River (Pet. App. A2, A6).[2] Ocoee No. 2 consists of a diversion dam, a 4.6 mile wooden flume and a powerhouse (Pet. App. A17). The dam has no storage capacity; it simply diverts water into the flume (*id.* at A18). The flume then carries the water to the powerhouse, where it is used to generate electric power (*id.* at A17).

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[1]In 1939, a special Joint Congressional Committee created by statute, Act of Apr. 4, 1938, ch. 61, 52 Stat. 154 *et seq.*, to investigate all aspects of TVA and its operations stated (S. Doc. 56, 76th Cong., 1st Sess. 20 (1939)):

> If the unified river control is to be financed by the Federal Government, it is apparent that the combined program must be under Federal control * * *. In judging the draw-backs inevitable in any large program, the fact must be kept constantly in mind that unified river control, under Federal authority, provides the only method known for solving a network of problems that are by their nature beyond the scope of private initiative, or of State or local government.

[2]The purchase was specifically authorized, and its financing through the issuance of bonds was provided for by Congress in Section 15c of the TVA Act, 16 U.S.C. 831n-3. The bonds have been repaid from power revenues provided by TVA's rate payers (Pet. App. A19 n.2).

In 1976, operation of the Ocoee No. 2 project was temporarily suspended to make repairs to the dam and flume (Pet. App. A19). While operation was suspended, the water of the Ocoee River that had previously been diverted through the flume was permitted to flow past the dam along its natural course. The newly expanded portion of the river became very popular for recreational rafting (*ibid.*).

During the period of shutdown, TVA completed extensive studies on the cost and desirability of repairing and returning the project to operation. On the basis of these studies, TVA concluded that Ocoee No. 2 was a valuable power asset that could and should be repaired and returned to operation as part of TVA's power system. TVA also concluded that it was precluded from wholly or partially diverting such a power asset to a non-power use unless the TVA power system was compensated for the lost power (Pet. App. A19-A20). When efforts to devise a means of reimbursing TVA for allowing the Ocoee River to be used for power part time and recreation part time fell through, the Ocoee River Council, an organization composed of rafters and commercial rafting interests, undertook to halt TVA from renewing operation of the power project.[3]

Eventually, the Council filed a complaint with the Commissioner of the Tennessee Department of Public Health, alleging that TVA's restoration of Ocoee No. 2 to operation would violate the Tennessee Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101 *et seq.* (1983 & Supp. 1983). "The complaint did not state or suggest that TVA's plans involve the discharge of any foreign substance into the

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[3]The Ocoee River Council initially brought suit in the United States District Court for the Eastern District of Tennessee, seeking to enjoin TVA from reopening the project on environmental and other grounds. The court eventually entered judgment in favor of TVA. *Ocoee River Council* v. *TVA*, 540 F. Supp. 788 (E.D. Tenn. 1981).

waters of the Ocoee River. Rather, it claimed that diversion of such waters through the restored flume would itself constitute a "degradation of these high quality recreation waters" (Pet. App. A22-A23). The Commissioner thereafter issued an order prohibiting TVA from diverting water through the repaired flume or using the water to produce power without a State permit. The order stated (C.A. App. 18-19): "TVA's proposed diversion of the waters of the Ocoee River will constitute an '* * * alteration of the physical, chemical, radiological, biological or bacteriological properties of * * * waters of the state.' "

2. TVA appealed the Commissioner's decision to the Tennessee Water Quality Control Board and simultaneously petitioned, pursuant to Section 313 of the Clean Water Act, 33 U.S.C. (Supp. V) 1323, to remove the case to the United States District Court for the Middle District of Tennessee. TVA also filed a separate complaint in the district court, requesting a declaratory judgment that Tennessee had no authority over TVA's dam operations.

The district court granted TVA's motion for summary judgment (Pet. App. A17-A24). The court held that Section 313 of the Clean Water Act authorizes states to regulate only facilities or activities that involve the discharge or runoff of pollutants, and that TVA's dam and diversion structures, which involve only diversion and do not discharge any pollutants, are therefore not facilities covered by the Act (Pet. App. A24).

3. The court of appeals affirmed (Pet. App. A1-A15). The court did not decide whether Section 313 limits the State's authority to regulate a federal agency to situations where the agency is actually causing a discharge or runoff of

a pollutant (Pet. App. A14).[4] Instead, the court held that the State could not require TVA to obtain a permit for discharges of a dam—a nonpoint source of pollution—under the authority of the permit system provided for in Section 402 of the Clean Water Act, 33 U.S.C. (& Supp. V) 1342. The court of appeals upheld the EPA's interpretation of Section 402 as limited to point sources that discharge "pollutants" as that term is defined in Section 502(6) of the Clean Water Act, 33 U.S.C. 1362(6).[5] The court concluded that the Ocoee No. 2 project does not discharge "pollutants" and therefore held that the project does not require a Section 402 permit. Since the Tennessee Commissioner had expressly relied upon the permit requirements of Section 402, the court did not "undertake to determine the limits of [the State's] authority" under any other provisions of the Act (Pet. App. A14).

ARGUMENT

1. Petitioners argue (Pet. 6-9) that the decision of the court of appeals constitutes a significant limitation on the authority of states to regulate water pollution. In fact, the decision below is a narrow one, rejecting the State's effort to regulate by permit the Ocoee No. 2 project. Since the basic decision of the court of appeals, rejecting the State's

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[4]The court of appeals accepted briefs from the United States (on behalf of the Department of Justice and the Environmental Protection Agency), and the Ocoee River Council as amici curiae. The United States argued in its brief amicus curiae that federal facilities "having jurisdiction over any property or facility" were to some extent subject to state pollution control requirements whether or not a "discharge or runoff" was involved (Pet. App. A10).

[5]Section 502(6) of the Clean Water Act, 33 U.S.C. 1362(6) provides in pertinent part:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

attempt to halt the operation of the TVA project, is correct, conflicts with no decision of this Court or any other court of appeals, and the decision will affect nothing except the single water project involved in this case, further review by this Court is unwarranted.

As petitioners concede (Pet. 9), the potentially important issue in this case—whether the waiver of sovereign immunity in Section 313 of the Clean Water Act for federal agencies with "jurisdiction over any property or facility" is limited to situations where there is an actual runoff of pollutants (see *State of Missouri ex rel. Ashcroft* v. *Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982))—was not decided by the court of appeals. What the court did decide was that Tennessee was attempting to enforce the discharge permit requirement embodied in Section 402 of the Clean Water Act, but was doing so in a way that was inconsistent with the limitations of that provision.

Petitioners do not challenge the court's legal conclusion that Section 402 does not apply to dams, such as Ocoee No. 2, that do not discharge any pollutants. See *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). But instead petitioners argue (Pet. 7) that the court of appeals erred in concluding that Tennessee's attempt in this case to control TVA's potential water pollution was limited to its authority under Section 402 of the Clean Water Act. The question of what the State of Tennessee was in fact relying upon as the basis for requiring a permit in this case is hardly a matter of any importance outside the context of this specific dispute.[6] Moreover, the court reached its

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[6]The court of appeals mentioned in passing that "[t]he right of the State to require discharge permits is derived solely from section 402" (Pet. App. A13). Petitioners argue (Pet. 7) that this is a completely unwarranted restriction on the State's power to deal with water pollution. If the court's statement were interpreted literally, it would seem to restrict unduly the State's power to control water pollution, but

conclusion regarding Tennessee's action on the basis of the State Commissioner's reliance on an opinion of the State's Attorney General that Section 402 is the basis for the State's permit enforcement efforts (Pet. App. A14).

In any event, this case is not an appropriate vehicle for deciding generally what the proper scope of a State's authority to regulate federal facilities is. This facility, unlike most, is backed by a specific congressional judgment that a dam should be operated on this site and as part of a unified system of river control (see notes 1 & 2, *supra*). Whatever power the State otherwise may have in such matters, it is clear that it has no power to halt continued operation of a particular project such as Ocoee No. 2, which Congress has specifically authorized, and thereby to frustrate the kind of unified operation of TVA's dam and reservoir system for which Congress specifically provided. See *California* v. *United States*, 438 U.S. 645 (1978).

2. Petitioners seek (Pet. 9-10) review of the court of appeals' decision not to address the issue whether state administrative proceedings are removable under 28 U.S.C. 1441. The court of appeals held (Pet. App. A14-A15) that removal under Section 313 of the Act is broader than under 28 U.S.C. 1441, because the former permits removal of "any proceeding" that involves the availability of Section 313's waiver of sovereign immunity. This interpretation is a reasonable reading of the statute, and conflicts with no decision of any other court. Accordingly, the decision does not warrant review by this Court.

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petitioners read far too much into this single statement in the court's opinion. It seems quite clear that the court only meant that the State's authority is limited to Section 402 in this case because "the state sought only to require a permit under authority derived from section 402" (Pet. App. A14). This interpretation of the opinion is consistent with the court's later comment that the State also has authority under Section 208 of the Clean Water Act, 33 U.S.C. 1288, to regulate pollution (Pet. App. 14).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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